



**COUNCIL OF
THE EUROPEAN UNION**

Brussels, 22 September 2011

14495/11

**Interinstitutional File:
2011/0154 (COD)**

**DROIPEN 99
COPEN 232
CODEC 1492**

NOTE

from : General Secretariat
to : Delegations

No. Prop. : 11497/11 DROIPEN 61 COPEN 152 CODEC 1018
No. Prev. doc. : 13360/11 DROIPEN 87 COPEN 197 CODEC 1299

Subject : Proposal for a Directive of the European Parliament and of the Council on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest
- Note by Belgium / France / Ireland / the Netherlands / the United Kingdom

Delegations will find in the Annex a note by Belgium, France, Ireland, the Netherlands and the United Kingdom relating to the proposed Directive.

Proposal for a Directive of the European Parliament and of the Council on the rights of access to a lawyer and of notification of custody to a third person in criminal proceedings
Note from Belgium, France, Ireland, the Netherlands and the United Kingdom

Belgium, France, Ireland, the Netherlands and the United Kingdom recall their agreement to the Roadmap for strengthening procedural rights of suspects and accused persons in criminal proceedings, agreed by the Council and ratified in the Stockholm Programme approved by the European Council in December 2009. They also confirm their commitment more broadly to the development of an area of freedom, security and justice, begun by the Treaty of Amsterdam and furthered by the Treaty of Lisbon, which made this one of the key objectives of the European Union.

These Member States also welcome that, as set out in the Roadmap, the Commission has proposed a Directive on the right of access to a lawyer in criminal proceedings and the right to communicate upon arrest, with the objective of establishing minimum standards to give these rights real and practical effect. There is no doubt that the right of access to a lawyer is one of the key elements of a defendant's right to a fair trial. An instrument establishing minimum standards in this area will be of importance for every suspected and accused person subject to criminal proceedings in the Union and for every criminal investigation and prosecution conducted by Member State authorities. It will contribute to strengthening mutual trust between the Member States. For these reasons, it is essential to get this Directive right.

Belgium, France, Ireland, the Netherlands and the United Kingdom would therefore like to express and explain their serious reservations about the Commission's approach in preparing this proposal which, as published, would present substantial difficulties for the effective conduct of criminal proceedings by their investigating, prosecuting and judicial authorities.

I. The Directive would hamper the effective conduct of criminal investigations and proceedings.

When preparing criminal procedural law, the importance of protecting the rights of the defendant is only one consideration. Any legislation in this field must enable criminal proceedings to be conducted effectively and efficiently, to ensure the right balance between the protection of individual rights and the wider public interest in the investigation and prosecution of offenders. This is also in the overall interests of the defendant – it ensures matters can be resolved expeditiously. It is not possible to legislate to enhance and strengthen the rights of defendants – either at EU or domestic level – without also factoring in the resources and functioning of the criminal justice system.

The Commission's proposal, as published, does not strike this balance. For example, to mandate the presence of a lawyer for every investigative measure where the suspect's presence is required or permitted (for instance when the suspect's fingerprints are taken), and to permit the physical presence of the lawyer in every case, no matter how minor. This imbalance would in many cases also lead to delay in the early stages of investigations, without commensurate added value for the suspect's interest which could even be harmed by such delay. It would also involve substantial additional resources from Member States.

The need for a balance between procedural rights and the effectiveness of the criminal justice system is also recognised in the case law of the European Court of Human Rights.

Any Directive should strike the right balance between on the one hand the right of access to lawyer and on the other hand the need to ensure the effectiveness of Member State justice systems. This means that an instrument in this field must be sensitive to the nature and requirements of different scenarios and categories of case.

II. There is no clarity on the Directive's relationship to the requirements of the European Convention on Human Rights

The European Convention of Human Rights (ECHR) and the case law of the European Court of Human Rights provide minimum standards for rights dealt with in this Directive. This case law is always directed at one country, in one concrete case, with all its specificities. Furthermore, the Court has consistently adhered to the principle that the right of access to a lawyer must be assessed and viewed in the context of the overall nature and circumstances of domestic criminal procedure. It is therefore not easy to draw general and abstract rules from the case law of the Court.

It is clear that in a number of respects the proposal goes beyond the current requirements of the ECHR. The ECHR forms a common minimum standard with which all Member States must already comply. Where a decision is taken by the EU legislature to go beyond these standards, this must be as a result of a clear policy decision, based on an evaluation of the impact this will have on both individual rights and the wider needs of criminal justice systems.

In some areas, the proposal takes judgments of the Court and expands them to cover other categories of case. For example, a finding by the Court that an incriminating statement obtained without the defendant being allowed access to a lawyer should not be admissible against him is used as the basis for extending this principle to all categories of evidence. Similarly, whilst there are cases where access to a lawyer in person will be essential, at no point has the Court envisaged a right to the physical presence of a lawyer at every stage of the investigation.

Moreover, various obligations included in the Commission's proposal are not based on established case law of the European Court of Human Rights concerning Article 6 of the ECHR, such as the right to have a lawyer inspect the place of detention and the right to communicate with a third party of one's choice, which the proposal appears to conflate with the right to have a third party notified of the detention.

It is therefore surprising that the Commission's Impact Assessment relies on the proposal's relationship to the ECHR rights to assert that it will have a comparatively negligible practical and financial impact on the legal systems of the Member States.

As a result, the Commission's proposal does not provide the Union's legislature with a clear picture of how the Directive truly relates to the ECHR standards and what the impact of the proposals will be.

III. The Directive must establish minimum standards in a way which takes into account the different ways in which Member State systems secure the right to a fair trial.

The Roadmap establishes a pragmatic, step-by-step methodology for securing minimum standards of criminal procedural rights in order to reinforce mutual trust within the European Union. Inherent in the Roadmap approach is that differences between national criminal justice systems must be taken into account in establishing minimum standards under Article 82(2) of the Treaty on the Functioning of the European Union.

Alongside a suspect's right of access to a lawyer, other factors which must be taken into account in order to secure the fairness of a trial include the maximum period of police detention, the speed with which someone is brought before a judicial authority, the role of judicial authorities and, of course, the availability of legal aid. There is substantial variation in the approach which different Member State systems take to these matters. It is important to maintain the balance between these various aspects of criminal procedural law in the different legal systems.

The proposal does not strike this balance. It contains an extensive right of access to a lawyer that applies to all crimes, suspects and stages of criminal proceedings, with no differentiation. For example, the rights would apply in the same way to a person dealt with in the street for a minor traffic offence as to someone detained on suspicion of a serious assault. A directive that ignores the fact that different rights will be applicable to different stages of criminal proceedings would have a significant adverse impact on national legal systems.

The Commission's proposal does not take into account the differences which exist between different systems and between different types and stages of proceedings. It will be essential to address this during the negotiations in order to ensure that this Directive produces a guarantee of real, practical and effective minimum rights for suspects and defendants in criminal proceedings.

IV The missing element: impact assessment and legal aid

The Commission's proposal is confined to the rules on when and how individuals should be able to access legal advice - it does not set out rules on legal aid. The Commission plans to deal with this separately in a future instrument. The two issues were joined in a single measure in the Roadmap on procedural rights, adopted by the Council and endorsed by the European Council in the Stockholm programme, reflecting that Member States envisaged these matters being dealt with jointly.

It is not possible fully to understand the differences between two national systems on access to a lawyer without taking into account the issue of legal aid. For those numerous EU citizens who do not have the private means to engage the services of a lawyer, the right to access a lawyer is not effective unless it is supported by an appropriate system of legal aid – this is explicitly acknowledged in the Roadmap.

Because there is such variation in legal aid systems, the impact on legal aid systems will vary greatly and some would have to bear very substantial additional costs. The decision to separate the proposals on legal aid from this Directive does not negate the need properly to evaluate the effect that this instrument would have, including in light of domestic rules on legal aid. That is something that should be taken into account at a time of serious economic and financial constraints.

The relationship between rules on access to a lawyer and rules on legal aid needs thorough political discussion. Any directive on the right of access to a lawyer should take into account the consequential costs and implications for Member States' legal aid systems.